IN THE
SUPREME COURT OF THE UNITED STATES

No. 76-657

THE NEWSPAPER GUILD,

Petitioner,

v.

EDWARD H. LEVI, Attorney General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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The Newspaper Guild, as collective bargaining agent for a substantial number of newspaper employees, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District Court (App. A., infra, pp. 1a-20a) is reported at 381 F. Supp. 48. The opinion of the Court of Appeals (App. B., infra pp. 21b-46b) is reported at 539 F.2d 755.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1976. Petitioner's petition for rehearing and suggestion for rehearing en banc was denied on August 19, 1976. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Does a Justice Department regulation which provides that the Attorney General's prior consent is not required for all joint newspaper operating arrangements entered into in the future, violate a statute that makes it unlawful for newspapers to enter into joint arrangements without obtaining prior approval?

(2) Did the Court below exceed the scope of its authority to construe statutes by basing its holding not upon the Act's plain meaning but upon an ambiguous legislative history?

STATUTES INVOLVED

The statute involved, section 4(b) of the Newspaper Preservation Act, provides that:

> It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.
> 15 U.S.C. § 1803(b).

The regulation challenged, 28 C.F.R. § 48.1, provides in pertinent part that:

> The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption

from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws.

STATEMENT OF THE CASE

This petition challenges the validity of a regulation promulgated by the Attorney General of the United States implementing the Newspaper Preservation Act ("Act"), 15 U.S.C. § 1801 et seq. (App. C, infra, pp. 47c-52c.)

A. Background Of The Newspaper Preservation Act.

The Newspaper Preservation Act was enacted by Congress in response to the decision in Citizen Publishing Co. v. United States, 394 U.S. 131 (1969). There this Court held that a joint operating arrangement between two daily newspapers in Tuscon, Arizona, constituted a per se violation of Section 1 of the Sherman Act and a violation of Section 7 of the Clayton Act.

The Newspaper Preservation Act legislatively overruled Citizen Publishing by granting a limited anti-

trust exemption to certain joint newspaper operating arrangements then in effect. However, in the face of considerable opposition to any antitrust exemption for any joint operating arrangement, Congress decided to restrict future entry into such arrangements by requiring, in section 4(b), that (1) not more than one of the newspapers involved in the proposed arrangement be other than failing; and (2) the agreement effectuate the policy and purpose of the Act. To ensure compliance with these criteria, section 4(b) further provides that all proposed arrangements must be approved by the Attorney General prior to effectuation.

The prior approval requirement was conceived by Senator Dirksen and was introduced, by amendment, during Senate hearings on the Act. Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 4 (1969). The amendment recommended by Senator Dirksen was adopted, in substance, as section 4(b). In introducing the amendment, Senator Dirksen explained that the Act was a "compromise solution" to protect the interests of small suburban and weekly newspapers as well as the newspapers already operating under joint arrangements. Id. at 8. He noted that the requirement that the Attorney General's consent be obtained for all future joint newspaper operating

arrangements furthered this compromise. The Senator stated:

> There has been some concern expressed regarding the possibility of new joint operating arrangements being established . . . There are still some 36 or 37 cities where two or more papers are competing commercially as well as editorially. And, there has been a genuine fear expressed by suburban papers, newspaper unions, and some segments of the public, and [sic] to the dangers inherent if some of these other papers were to improperly enter into joint operating arrangements -- resulting in what might be a stronger competitive force, the loss of jobs, and maybe, eventually, a loss of independent view points.
>
> That is what I had in mind in proposing Section 4(b). Before any new joint operating arrangements could come into being, the papers involved would be required to come before the Attorney General for his approval . . . . Id. at 9, (emphasis added).

At the Senate Subcommittee hearings, former Assistant Attorney General McLaren, then head of the Antitrust

Division, made clear that the Justice Department shared Senator Dirksen's views on section 4(b). Mr. McLaren stated:

> Senator Dirksen's bill, as I read it, would give antitrust immunity to agreements already in effect, but would make prospective agreements unlawful, unless first approved by the Attorney General on a finding that a failing newspaper was involved. Id. at 297.

B. Proceedings in the District Court.

This action was filed in the district court on February 19, 1974, asserting jurisdiction under 28 U.S.C. §§ 1331, 1337, 2201-2, and 5 U.S.C. §§ 701-6. Plaintiff Newspaper Guild, collective bargaining agent for a substantial number of newspaper employees, alleged in its complaint that regulations, codified as 28 C.F.R. § 48.1, issued by the Attorney General on January 2, 1974, under the Newspaper Preservation Act were unauthorized, contrary to law and amounted to, in effect, a repeal of section 4(b) of the Act rather than a rule implementing it.

The district court (Judge Flannery), on July 23, 1974, granted plaintiff's motion for summary judgment and declared that the Justice Department's regulation was an erroneous and unlawful interpretation of the Newspaper Preservation Act and enjoined implementation of that regulation. The district court found that a literal reading of section 4(b) requires, as defendant had agreed, that no joint newspaper operating arrangement be put into effect after passage of the Act without the prior written consent of the Attorney General. (App. A, infra, p. 4a.) In reviewing the legislative history, the court saw no Congressional purpose or intent clearly contrary to the unambiguous language of section 4(b). (App. A, infra, pp. 4a-5a.)

The district court concluded that Congress might very reasonably have intended the literal words of section 4(b). In view of the strong opposition to the Act's grant of an antitrust exemption to the twenty-two existing joint newspaper operating arrangements it was logical for Congress to require that all new arrangements be approved by the Attorney General before they could be put into effect. (App. A, infra, pp. 10a-11a.) The district court reasoned that the requirement of prior approval would assure that the antitrust exemption for failing newspapers would be strictly limited

and scrupulously enforced. The lack of specific enforcement procedures or penalties in the Newspaper Preservation Act did not, in the court's view, militate against the finding that a failure to obtain the Attorney General's consent for a joint newspaper operating arrangement constitutes a violation of law. (App. A, infra, p. 15a.)

Defendants moved for rehearing on August 2, 1974, claiming that the district court's judgment had been based on a factual inaccuracy -- that joint newspaper operating arrangements were not entered into by non-competing newspapers. The defendants asserted that, in fact, non-competing newspapers also entered into joint operating arrangements and that under the district court's interpretation such arrangements would be unable to obtain the Attorney General's consent. The court issued an order denying this motion on September 27, 1974, reiterating that its earlier decision had been based primarily on the clear and unambiguous language of section 4(b) and the absence of any contrary legislative intent. (App. A, infra, pp. 17a-18a.) The court noted that if Congress did not intend the Act to mean what it plainly states, then the proper course for defendant would be to seek clarification or amendment of the Act from Congress. (App. A, infra, pp. 18a-19a.)

C. Proceedings in the Court of Appeals.

On appeal, the United States Court of Appeals for the District of Columbia Circuit (Judges McGowan, Tamm and Robb) reversed (Judge Tamm dissenting) on the ground that, although literally correct, the interpretation of the district court was contrary to the "object and policy" of the Congress as expressed in the Act and its legislative history. The majority emphasized that the purpose of the Act was to permit certain combinations in the newspaper industry and that a requirement of prior approval of joint arrangements frustrates this purpose. (App. B, infra, pp. 32b-33b.) It was noted that the district court's analysis of the Act would have the anomalous effect of prohibiting joint agreements between healthy, non-competitive newspapers simply because the Attorney General could not, under the statute, approve an agreement where more than one of the newspapers involved is "other than a failing newspaper." (App. B, infra, pp. 28b, 31b-32b.) In support of its position the Court of Appeals noted that Senator Dirksen had proposed a proviso to section 4(b) (referred to as the "status quo" provision) designed to ensure that Congress did not prohibit, by inadvertence, arrangements which were lawful at the time the Act was passed. Although

this proviso was deleted by the House, the Court of Appeals nevertheless found that the district court's interpretation of the Act would prohibit joint agreements that had no anti-competitive impact and was, therefore, contrary to the intent of Senator Dirksen's amendment. (App. B, infra, pp. 28b-32b.)

Judge Tamm, in a dissenting opinion, acknowledged that Congress may not have appreciated all the ramifications of imposing the prior approval requirement, but he cautioned the court to take the statute as it found it, to "interpret the Act according to its terms and its history . . . ." (App. B, infra, p. 46b.) The dissent noted that the appearance of the term "unlawful under any antitrust law" in all subsections of section 4 except subsection (b) lent credence to the conclusion that Congress intended subsection (b) to create a new type of violation: one distinct from the other antitrust laws. That, coupled with the broad language of subsection(b), was sufficient evidence of an intent by Congress to fashion a new type of substantive violation: to wit, all new joint agreements which do not receive prior approval are illegal, regardless of whether they would otherwise violate antitrust laws. (App. B, infra, pp. 36b-37b.) Moreover, the prior approval requirement was consistent with Congress'

attempt to allay the fears of the Act's opponents that a broad exemption from the antitrust laws would result in loss of jobs, lessen competition and destroy separate editorial voices in cities where joint agreements might operate. (App. B, infra, pp. 36b-40b.) With respect to the status quo provision proposed by Senator Dirksen to ensure that the Act did not, by inadvertence, make unlawful arrangements that would have been lawful prior to the Act, the dissenting opinion reasoned that its deliberate deletion demonstrated that Congress favored a requirement of prior approval for all future arrangements. (App. B, infra, pp. 40b-42b.) Finally, as to the absence of enforcement provisions, the dissent suggested that this omission reflected a lack of thorough planning by Congress but that it in no way negated the prior approval requirement. (App. B, infra, p. 43b.)

REASONS FOR GRANTING THE WRIT

The Newspaper Preservation Act, and, most particularly the interpretation finally ascribed to section 4(b) by the courts, may ultimately affect virtually all of the newspapers in this country and the livelihood of their employees.

As the court below noted, "[t]his case presents a narrow, albeit important,

issue of statutory interpretation." (App. B, infra, p. 22b.) This case is important in two respects. First, by broadening the exemption so that future joint agreements are not mandatorily subject to the advance scrutiny of the Attorney General, the decision below frustrates the effectuation of the Act's overriding purpose of preserving a free and competitive press. Second, the method of statutory construction used by the court below substantially deviates from the principles of construction set forth by this Court, and hence constitutes a judicial usurpation of legislative prerogative.

A. The Decision Below Frustrates Effectuation Of The Act's Overriding Purpose.

This Court, in Associated Press v. United States, 326 U.S. 1, 20 (1954), stated that:

> [The First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.

However, as this Court, commenting on

the "communications revolution" in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 249-251, (1974)(footnotes omitted), observed:

> The printed press . . . has not escaped the effects of this revolution. Newspapers have become big business and there are far fewer of them to serve a larger literate population. Chains of newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become non-competitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events. . . .
>
> The elimination of competing newspapers in most of our large cities, and the concentration of control of media that results from the only newspaper being owned by the same interests which own a television station and a radio station, are important components of this trend toward concentration of control of outlets to inform the public.

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. . . . In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues. . . .
>
> The obvious solution, which was available to dissidents at an earlier time when entry into publishing was relatively inexpensive, today would be to have additional newspapers. But the same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers, have made entry into the marketplace of ideas served by the print media almost impossible. . . . From this premise it is reasoned that the only effective way to insure fairness and accuracy and to provide for some accountability is for government to take affirmative action.

As implied by this Court's recitation in Tornillo, existing exempt joint operating arrangements are protected at an enormous social cost. In their

communities these jointly operated papers have a stranglehold on the news and advertisements the public will read and on the price business must pay for advertising space. 1/ The continued existence of such strongly entrenched papers tends to stifle competition both in ideas and in commercial activities by crippling the growth of small dailies and inhibiting the entry of potential competitors.

1/ It is not to be presumed, however, that all advertisements will be published. With the exception of one lower state court decision, courts have uniformly held that absent statutory authority, newspapers may reject whatever advertising they wish. See, e.g., Chicago Joint Board v. Chicago Tribune Co., 307 F. Supp. 422 (N.D. Ill. 1969), aff'd 435 F.2d 470 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); Associates & Aldrich Co. v. Times Mirror Co., 440 F.2d 133 (9th Cir. 1971); and Resident Participation v. Love, 322 F. Supp. 1100 (D.Colo. 1971). Compare, Uhlman v. Sherman, 22 Ohio N.P. (N.S.) 225, 31 Ohio Dec. 54 (1919). See generally, Dorsen, et al., I POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, 578-580 (4th ed. 1976).

Preserving commercial competition has traditionally been the province of government antitrust enforcement. But, although this Court in Associated Press v. United States, 326 U.S. 1 (1954), rejected the argument that the press is immune from the antitrust laws by virtue of the First Amendment, there nevertheless exists a special tension between governmental regulation of competition and the constitutional protections accorded the press. As Mr. Justice Frankfurter cautioned in his concurrence in Associated Press v. United States, supra, at 28-29:

> [T]he freedom of enterprise protected by the Sherman Law necessarily has different aspects in relation to the press than in the case of ordinary commercial pursuits. The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship.

The distinction between antitrust regulation of the commercial aspects of the press and antitrust regulation of ordinary industry justifies Congress' decision to single-out the newspaper industry and adopt a system of prior approval rather than ex post facto enforcement.

Congress passed the Newspaper Preservation Act to protect against further concentration in the newspaper industry and, according to the language of the Act, thereby promote:

> the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States. . . . 15 U.S.C. § 1801.

The prior consent requirement was adopted in order to ensure that the public interest would be effectively protected. We suggest that when examined with due regard for the stated rationale underlying the statute; to wit, providing an exemption only for those future arrangements designed to protect failing papers in a manner consistent with the Act, the interpretation adopted by the majority below, that section 4(b) does not require mandatory prior approval, cannot be sustained.

The interpretation of the majority below does not comport with the goals of the Act. Indeed, as Senator Dirksen pointed out during his sponsorship of section 4(b), the Department of Justice has had, for years prior to the passage of the Act and continuing to the present, an optional procedure for obtaining its approval of agreements raising antitrust questions. This is the release-letter technique which the majority below concluded was the analogue of section 4(b). 28 C.F.R. § 50.6 (1975), cited in n.4, App. B, infra, pp. 27b-28b. But, if the statute is to be interpreted as the majority panel suggests, the disputed sentence in section 4(b) would have added nothing to existing law because the release-letter procedure for prior approval was already available. This reading mocks Senator Dirksen's assurances to his colleagues that his compromise proposal "will act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements," and nullifies the vitality of section 4(b). Hearings, supra, at 9.

The statutory scheme requiring the Attorney General's prior approval was adopted solely to ensure that antitrust enforcement in the newspaper industry occurred when it could be efficacious

-- prior to the joining of operating facilities. Joint operating agreements can be entered into secretly and put into effect overnight. Plants are closed, workers are discharged, facilities are merged, competition ends and substantial collaboration between two, or among several, previously autonomous papers begins. Necessarily, this process results in substantial economic and social dislocation. Attempting to undo such arrangements after antitrust prosecution would inevitably protract and compound the dislocation and is not likely to be successful.

Congressional recognition of the difficulties inherent in unscrambling the assets and facilities of improperly joined newspapers provided much of the justification for granting exemptions to pre-existing joint operating arrangements. See, H.R. Rep. 91-1193, at 9, U.S. Code Cong. & Admin. News 1970, p. 3547. But Congressional recognition of the difficulties in undoing such improper arrangements also suggests that the interpretation of the majority below is incorrect. Under that interpretation, joint operating arrangements may be entered into without the Attorney General's prior approval, although nonetheless subject to antitrust laws. Courts, however, can not effectively enjoin and undo arrangements which the Attorney General, had he prior

notice, would not have approved under the Act.

Therefore, the lower court's interpretation of section 4(b) jeopardizes the very interests Congress sought to protect by the Act, and, if uncorrected, will certainly compound the problems of preserving a free and competitive press. The sanction of subsequent prosecution under the antitrust law, with its illusory remedy of resurrection of the constituent papers, is clearly not the answer Congress explicitly provided in section 4(b). Surely, Congressional intent to protect this vital First Amendment concern should not be so easily defeated.

B. Interpretations Contrary To A Statute's Plain Meaning Should Be Permitted Only When Supported By Unambiguous History.

The function of the courts in interpreting statutes is "to give effect to the intent of Congress." United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940)(footnote omitted). One of the important duties of this Court is to prescribe the parameters lower federal courts must observe in fulfilling this function. The most recent formulation of these parameters is set forth in Train v. Colorado Public Interest Research Group, ___ U.S.

___, 48 L.Ed.2d 434, 96 S.Ct. 1938, (June 1, 1976). In Train, this Court suggested that the imposition of an interpretation contrary to a statute's plain or unambiguous wording is justified only if the court's interpretation is supported by a clear Congressional intent expressly delineated in the legislative history. Id. at 441, citing, United States v. American Trucking Ass'ns, 310 U.S. 534, 543-544 (1940).

The court below, while acknowledging that a "literal reading" of section 4(b) undeniably supported the district court's conclusions, found that the legislative history demanded a contrary result. (App. B, infra, p. 6.)

Clearly the court below was entitled to examine the legislative history of the Act. But, that history is, at best, ambiguous and thus hardly constitutes a sound basis for rejecting reliance on the plain meaning of the statute. 2/

2/ In rejecting the statute's plain meaning, the court below failed to heed this Court's instructions that "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." (footnote continued)

This difficulty is further compounded by the majority's imposing an interpretation of section 4(b) precisely opposite to that suggested by a plain reading of the words of the statute. The majority below supported this interpretation by reference to several inconsistencies between the statutory scheme and the legislative history. First, the majority noted that the literal requirement of prior approval in section 4(b) does not resemble the release-letter procedure employed by the Justice Department. Senator Dirksen had suggested during the debates that the two procedures would be similar. Second, the majority found that the requirement of prior approval in all cases would have the anomalous effect of prohibiting the Attorney General from consenting to a proposed joint printing arrangement between two financially healthy, noncompeting newspapers. And third, the majority pointed out that absence of either civil or criminal penalties casts doubt upon the interpretation that Congress, in section 4(b), intended to impose a new substantive standard of liability.

(footnote continued)
United States v. American Trucking Ass'ns, 310 U.S. 534, 543 (1940).

The majority below held that these factors indicated that Congress, despite the conceded clarity of the statute, did not intend to require prior approval for all future joint operating arrangements. To remedy the inconsistencies it perceived between the statutory language and the legislative history, the majority held that section 4(b) gave newspapers entering into joint operating arrangements after the effective date of the Act an option to obtain the prior consent of the Attorney General.

Unfortunately, the ambiguities or inconsistencies in the statute perceived by the court below were not addressed by Congress. Thus, assuming arguendo that the court below correctly discerned the statute's flaws, there is, in effect, a void in the legislative history. In filling that void by removing the prohibition from section 4(b), the court assumed the duties of Congress. As Mr. Justice Frankfurter admonished:

> [T]he function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. . . . A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He [the Judge] must not read in by way of creation.
> Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L.Rev. 527, 533 (1947).

Accordingly, in a case where the legislative history does not definitively demonstrate Congressional intent, the better judicial course is to defer to the plain meaning of the clear and unambiguous language of the statute. As this Court stated in NLRB v. Plasterers' Local Union No. 79, 404 U.S. 116, 129 n.24 (1971); citing, U.S. v. Dickerson, 310 U.S. 652 (1940):

> In construing a statute, . . . legislative materials, if "without probative value, or contradictory, or ambiguous," should not be permitted to control the customary meaning of words.

Accord, Gemsco, Inc. v. Walling, 324 U.S. 244, 260 (1945). 3/

3/ In this connection, we are constrained to recall the quip of Mr.

(footnote continued

Although prior opinions have implied that such a course is favored, this Court has not yet expressly held that a court may adopt an interpretation contrary to a statute's plain wording only when the interpretation is supported by clear Congressional intent expressed in unambiguous legislative history. Cf., Train v. Colorado Public Interest Research Group, Inc., ___ U.S. ___, 48 L.Ed.2d 434, 96 S.Ct. 1938 (June 1, 1976). See, e.g., United States v. American Trucking Ass'ns , Inc., 310 U.S. 534 (1940); Center for National Policy Review on Race And Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974). This Court's failure to adopt explicitly such a rule has engendered much confusion in the lower courts. Compare, cases cited in Murphy, Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts, 75 Colum. L. Rev. 1299 (1975). 4/

(footnote continued)
Justice Frankfurter in Greenwood v. U.S., 350 U.S. 366, 374 (1956) which is especially apt here,"[t]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."

4/ Professor Murphy concludes that "it seems fair to fault the courts for so
(footnote continued)

The opinion below demonstrates the difficulties and uncertainties created by judicial statutory interpretation based on ambiguous legislative history. To allow this practice to continue belies the warning of this Court in United States v. American Trucking Ass'ns , supra, at 544; that "there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced . . . by factors not considered by the enacting body."

Four judges have passed on the issue in this proceeding: two voted to give effect to the plain meaning of the statute, and two voted for the interpretation proferred by the Antitrust Division. As the panel below pointed out, the issue here is important. Permitting courts to rely on anything less than clearly expressed legislative intent, either in the statutory language or history, is tantamount to permitting the courts to undermine the will of the public as determined by Congress. This point is most compelling where the interests at stake are as vital as the preservation of an independent and competitive press. We therefore suggest

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(footnote continued)
completely failing to come up with a coherent approach to the job of statutory construction." Murphy supra, at 1315.

that this Court should make the final determination resolving these substantial issues of antitrust policy and statutory construction.

CONCLUSION

The court below has significantly misinterpreted the purpose of the Newspaper Preservation Act. If unreviewed, the decision seriously threatens the economic independence of many of our nation's newspapers and the livelihood of newspaper employees.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

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November 3, 1976

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 74-308

The Newspaper Guild, Plaintiff,

v.

William B. Saxbe, Defendant.

July 23, 1974

Rehearing Denied Sept. 27, 1974.

Victor H. Kramer, Richard B. Wolf, John H. Harwood II, Washington, D.C., for plaintiff; David S. Barr, Washington, D.C., of counsel.

Charles S. Stark, U.S. Dept. of Justice, Washington, D.C., for defendant.

MEMORANDUM OPINION

FLANNERY, District Judge.

This case concerns the Justice Department's interpretation of section 4(b) of the Newspaper Preservation Act. 15 U.S.C. §§ 1801-1804. This court has jurisdiction under 28 U.S.C. §§ 1331, 1337.

The Newspaper Preservation Act, enacted July 24, 1970, provides a limited exemption from the antitrust laws for certain joint newspaper operating arrangement [1] that comply with the terms of the Act. The Act provides a means by which two or more newspapers, all but one of which is "failing," [2] can apply to the Attorney General for such an exemption. Section 4(b) provides:

> It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publica-

1 A joint newspaper operating arrangement is any contract or other agreement between two or more newspaper owners pursuant to which the newspapers share facilities for printing, circulation, and other departments, except that there can be no merger of editorial or reportorial staffs. 15 U.S.C. § 1802(2).

2 A failing newspaper is one which "is in probable danger of financial failure." 15 U.S.C. § 1802(5).

> tions involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter. 15 U.S.C. § 1803(b).

Despite this clear language that all joint newspaper operating arrangements not already in existence must obtain prior consent from the Attorney General, the Justice Department on December 20, 1973, issued the following regulation:

> The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws. 28 C.F.R. § 48.1(1974), 39 Fed. Reg. 7 (Jan. 2, 1974).

Plaintiffs seek a declaratory judgment that such regulation is an unlawful interpretation of the Act and an injunc-

tion against implementation of said regulation. The matter is presently before the court after oral hearing on defendant's motion to dismiss and plaintiff's motion for summary judgment.

[1] The defendant agrees that if section 4(b) is read literally, it is unlawful for any joint newspaper operating arrangement to be put into effect without prior Attorney General consent. Defendant's Motion to Dismiss at 5. The general rule is that where statutory language is clear, a court should not inquire further into the legislative purpose or intent but rather should order compliance with the clear language of the statute. Helvering v. City Bank Farmers Trust Co., 296 U.S. 85, 89, 56 S.Ct., 70, 80 L.Ed. 62 (1935).

[2] Nevertheless, defendant urges that to read section 4(b) literally is to ignore Congress' intent and purpose and will lead to futile and absurd results. This court agrees that on occasion a court may deviate from otherwise clear and unambiguous statutory language. "A court may qualify the plain meaning of a statute when its consequences -- plainly absurd, inequitable, or in conflict with legislative intention to the contrary." Center for National Policy Review on Race & Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974). However, on

review of the legislative history and Congressional purpose in enacting the Act, this court finds no clear Congressional purpose or intent contrary to the clear and unambiguous language of section 4(b). Further, this court perceives no futile or absurd results that may flow from a literal interpretation of section 4(b). Accordingly, this court will grant plaintiff's motion for summary judgment and will order the requested injunctive and declaratory relief.

I.

[3] To understand clearly the defendant's position and this court's rejection thereof, it is important to relate briefly the background of the Newspaper Preservation Act. The Act was enacted because of Congressional concern about the trend toward one-newspaper cities. In 1910, 60 percent of American dailies served cities in which there were two or more such newspapers; by 1968, the same figure had dropped to 15 percent. H.R. Rep. No. 91-1193, at 3-4, U.S. Code Cong. & Admin. News 1970, p. 3547. In large part this decline was due to the increasing economic difficulty facing competing dailies. To meet this problem competing dailies in some cities began as early as 1933 to enter into joint newspaper operating agreements.

By 1966, there were 22 such arrangements. Id.

In 1964, the Justice Department initiated an investigation of these arrangements for possible violations of the antitrust laws. Suit was filed in 1965 and culminated in Citizen Publishing Co. v. United States, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969), which held the joint operating arrangement in Tucson, Arizona, to be violative of sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act. The Court rejected the newspapers' "failing company" defense because they could not show that one of the papers actually was contemplating liquidation and that there was no other viable alternative, including a purchaser or bankruptcy reorganization.

During the Citizen Publishing litigation various bills were introduced in Congress to grant an antitrust exemption for joint newspaper operating arrangements. The Newspaper Preservation Act, passed 16 months after the Citizen Publishing decision, was a legislative overruling of the Supreme Court's decision and a grant of a limited antitrust exemption for certain joint newspaper operating arrangements. In crucial part the Act provides that those joint newspaper operating arrangements

which were in existence at the time of passage of the Act are permitted to continue with only minor qualification. 15 U.S.C. § 1803(a). As to joint operating arrangements not previously in existence, however, Congress enacted section 4(b), which, on its face, makes it per se unlawful for any new arrangement to be put into effect without the prior consent of the Attorney General.

The Justice Department contends that it was the Congressional intent that section 4(b) offer a means by which joint operating arrangements like those in Citizen Publishing, all of which probably were violative of the antitrust laws, could obtain an antitrust exemption. The Justice Department correctly asserts that plaintiff's literal construction of section 4(b) would make illegal joint operating arrangements that are put into effect in the future without Attorney General consent, even if they would not have violated the antitrust laws prior to passage of the Act. The Justice Department also notes that many of these arrangements that would not have been in violation of the antitrust laws will be unable to obtain consent because none of the papers will be "failing." See 15 U.S.C. § 1803(b). Hence, defendant urges that this court accept its interpretation under which failure to obtain prior consent would

not be per se illegal but would only leave the newspapers involved fully subject to the antitrust laws.

This court rejects the defendant's argument, finding rather that a literal interpretation of section 4(b), even with the consequences defendant recounts, leads to no absurd or inequitable results in conflict with legislative history or Congressional purpose. In passing the Newspaper Preservation Act, Congress broadly expanded the "failing newspaper" definition used by the Supreme Court and legislatively overruled the Court's 16-month-old decision. Further, Congress granted a broad exemption for all 22 joint newspaper operating arrangements then in existence and specifically authorized reinstatement of the Tucson plan. Plaintiff is correct in terming this "an enormous plum." There was considerable opposition to the Act. See H.R.Rep. 91-1113, at 9, 12-13, U.S. Code Cong. & Admin. News 1970, p. 3547. As Senator Dirksen stated:

> [T]here has been a genuine fear expressed by suburban papers, newspaper unions, and some segments of the public, and to the dangers inherent if some of these other papers were to improperly enter into joint operating arrangements -- resulting in what

> might be a stronger competitive force, the loss of jobs, and maybe, eventually, a loss of independent viewpoints. Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 91st Cong., 1st Sess. 9 (1969).

It was in light of this opposition and the broad exemption granted to pre-existing joint operating arrangements that Congress finally enacted section 4(b). Upon consideration of these factors the court concludes that Congress very reasonably might have intended the literal words of section 4(b) -- that no new arrangements be put into effect without prior approval.

Senator Dirksen originally suggested a proviso to section 4(b) that stated:

> [T]hat any publication may at any time propose, enter into, perform or enforce an agreement with any person if such agreement was not prohibited by law prior to the effective date of this Act. Hearings, supra at 8.

Senator Driksen explained the proviso's purpose as "to make sure that we have not inadvertently made illegal . . .

arrangements which are now lawful." Id. at 9. This proviso was not enacted in the final law. The Justice Department urges, without citation, that the proviso was dropped because it was clear Congress so intended even without the proviso. This Court declines to so assume. It appears just as probable that the proviso was dropped in face of considerable opposition to the bill and hence it was understood that all joint operating arrangements that might be entered in the future must have prior approval.

A literal interpretation of section 4(b) makes further sense in light of the problems that would arise if prior consent was not required of all such arrangements. Arrangements perhaps would be put into effect without prior approval but with substantial economic change by the parties. If the Justice Department then brought suit, there would be considerable economic dislocation and perhaps some hesitancy to sue unless the violation was flagrant. The House Report indicates that Congress was concerned with just such economic dislocation when it decided to grant the broad exemption to all 22 arrangements in existence when the Act passed. See H.R. Rep. 91-1193, at 9, U.S. Code Cong. & Admin. News 1970, p. 3547. Given these problems and the substantial

opposition to the Act, it is reasonable to assume that Congress intended prior consent for all future arrangements to be mandatory, thus avoiding complex litigation and economic disruption and also assuring that the antitrust exemption would be kept narrow and closely enforced.

Finally, this court rejects defendant's argument that a literal reading of section 4(b) is incorrect because it could lead to invalidation of many joint newspaper operating arrangements that would have been legal under prior law but now cannot be put into effect because consent cannot be obtained. Congress declined to include an express proviso which would have abated this fear. See supra. More important, the Justice Department's concern is more imaginary than real. These arrangements are entered between competing newspapers; such arrangements between newspapers in different cities -- as hypothesized by defendant -- simply do not exist.[3] Since this court concludes that these arrangements are and will be

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3 The Justice Department has not cited to this court a single such arrangement, legal before the Act, that will be illegal after the Act because of inability to obtain consent.

entered into by competing daily newspapers, it is consistent with the Act to require all such arrangements to obtain prior Attorney General consent.[4] This will lead to no futile, absurd, or inequitable results or results clearly at odds with Congressional purpose. Hence, this court declines to deviate from the clear words of the statute.

II.

Both parties assert that the legislative history supports their interpretation of section 4(b). However, the legislative history is, at best, unclear on this issue. Only one portion of the legislative history appears to support the defendant's position. This passage states that "joint newspaper operating arrangements, to have the benefit of an exemption from the antitrust laws, must have the prior written consent of the Attorney General. . . ." H.R. Rep. 91-1193, at 11, U.S. Code Cong. & Admin. News 1970, p. 3556. This passage implies that where no consent is obtained, any arrangement remains fully subject to the

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4 Even if two competing papers in the same city enter a joint newspaper operating arrangement that would have been legal under prior law -- and again no [footnote continued]

antitrust laws and similarly implies that failure to obtain consent is not per se illegal. However, the same report states "[t]he bill requires the Attorney General to review and approve the terms of any joint newspaper operating arrangement not already in effect." Id. at 10, U.S. Code Cong. & Admin. News 1970, p. 3554.

The hearings and debates on the Act, while not ordinarily as valuable as the

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[footnote continued]
such instance has been brought to the court's attention -- it is consistent with the Act to require Attorney General consent. In granting the exemption to the 22 existing arrangements, Congress also sought to make certain that only particular agreements in the future would obtain approval. If the arrangement does not obtain consent (as for example where neither paper is failing), Congress' clear language was that such an agreement not be put into effect. This is consistent with the Act's policy of allowing arrangements only where such are necessary to preserve a failing newspaper. See 15 U.S.C. § 1801. Where such a purpose for an arrangement does not exist, Congress, very consistently with strict enforcement of the antitrust laws, has decided that such arrangements shall be banned.

final report, support the plaintiff's interpretation of the Act. This court considers them valuable in this case since the House Report is far from conclusive. Thus, Senator Dirksen, speaking of a somewhat different version of the Act, stated of section 4(b):

> Before any new joint operating arrangements could come into being, the papers involved would be required to come before the Attorney General for his approval. Hearings, supra at 9.

And Richard McLaren, Assistant Attorney General, Antitrust Division, Department of Justice, stated:

> Senator Dirksen's bill . . . would give antitrust immunity to agreements already in effect, but would make prospective agreements unlawful, unless first approved by the Attorney General on a finding that a failing newspaper was involved. Id. at 297.

See also 116 Cong. Rec. 23146 (1970) (comments of Rep. Kastenmeier); id. at 23154-55 (comments of Rep. Railsback); id. at 23167 (comments of Rep. Edwards); id. at 23171 (comments of Rep. Butler). This court concludes that the legislative history does not clearly support defendant's interpretation of section 4(b) and accordingly the clear and unambiguous language of the statute must control.

III.

[4] Defendant finally asserts that the absence of any specific enforcement machinery or penalties for failure to obtain prior consent indicates that Congress did not intend that such failure would be per se illegal. Plaintiff asserts in response that the statutory language is clear and that Congress meant in section 4(b) that failure to obtain consent would be unlawful under the antitrust laws and hence that the enforcement procedures of those laws apply. This court finds it unnecessary to resolve the question of precisely how enforcement of the prior consent provision might be obtained. It is sufficient that the lack of specific enforcement machinery does not militate against the court's previous conclusions that a literal reading of section 4(b) is not against reasonable Congressional purpose or intent and does not lead to futile or absurd results. Congress authorized the Justice Department to issue regulations regarding the procedure for obtaining prior consent. H.R.Rep. 91-1193, at 11, U.S. Code Cong.

& Admin. News 1970, p. 3547. When those regulations are issued and a violation thereof is encountered, a court then can consider what enforcement procedures are proper.

Conclusion

This court finds that according to the clear and unambiguous language of section 4(b), all joint newspaper operating arrangements not in effect on July 24, 1970, must obtain the Attorney General's consent before they may be put into effect. The court is unpersuaded that there is a clear contrary legislative intention such that this court would be justified in deviating from the plain meaning of the statute. Plaintiffs, therefore, are entitled to a declaratory judgment that the Justice Department's interpretation is contrary to the law and to an injunction prohibiting the Justice Department from implementing that erroneous interpretation.

ON MOTION FOR REHEARING

On July 23, 1974, the court granted plaintiff's motion for summary judgment, declaring that 28 C.F.R. § 48.1(1974) was an erroneous interpretation of the Newspaper Preservation Act and enjoining implementation of that regulation. In

its Memorandum Opinion the court stated "that these arrangements [joint newspaper operating arrangements] are and will be entered into by competing daily newspapers. . . ." Memorandum Opinion at 51. Defendant has petitioned the court to reconsider its earlier judgment, asserting that the above statement is inaccurate and that the inaccuracy was a substantial factor in the court's decision to rule for plaintiff.

In answer, the court first corrects defendant and explains that the quoted statement did not contribute substantially to the court's decision, but arose mainly because of defendant's failure to respond to the court's questions. See note 2 infra. [1] Rather, the court's reasoning rested predominantly upon the clear and unambiguous language of the statute and the evidence in legislative history that Congress, in return for grant of a limited antitrust exemption, sought to limit future joint newspaper operating arrangements unless prior approval was obtained in conformance with the strict requirements of the Act. Under the authorities cited in the court's earlier opinion and given the complete absence of contrary legis-

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1 Indeed, the cited statement constituted only one paragraph of the court's opinion.

lative intent, the court feels obligated to give the statute its literal and obvious interpretation.

Defendant now has submitted an affidavit and documents which purport to show that there are some joint newspaper operating arrangements between noncompeting newspapers which would be illegal under the court's earlier ruling. This evidence was not submitted to the court for consideration on the motion for summary judgment. [2] However, even when considering such evidence, the result remains the same. The statutory language and lack of contrary legislative intent militate against defendant's interpretation. If, as defendant contends, this interpretation is not what Congress meant, then the proper course for defendant is to seek

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2 Defendant, although not submitting evidence earlier, argued that such noncompeting joint newspaper operating arrangements did exist. The court dismissed that contention when, in answer to the court's query for some examples, defendant could not cite a single example. Further, as plaintiff points out, such evidence as defendant now submits was not before Congress when the Act was enacted and thus probably should not be considered by the court in interpreting the Act.

Congressional clarification or amendment. Further, there is no showing by defendant how many of the multiple use printing plants cited by defendant are actually joint newspaper operating arrangements within the Act's definition, [3] and the evidence defendant submits in no way indicates how many of these multiple use printing plants involve noncompeting newspapers. Finally, in the Department of Justice's regulation there was no delineation between competing and noncompeting newspaper arrangements.[4] Under the Department's regulation, any joint newspaper operating arrangement, even those between competing papers,

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3 See 15 U.S.C. § 1802(2). For example, if two papers use an independent printing establishment with no arrangement between the papers, then no joint newspaper operating arrangement would appear to have been established.

4 In passing the court notes that in this motion for rehearing the Department of Justice contests as erroneous only the court's statement that such arrangements are not entered into by noncompeting newspapers. By inference, although not admitted by defendant, it thus appears that defendant accepts that such arrangements between competing newspapers would violate the Act absent compliance with section 4(b).

could be put into effect without prior approval. Section 4(b) of the Act evinces a Congressional concern that prior to any such arrangements, permission be sought and obtained. At least in part this was due to Congress' desire to avoid the disruptive effect of later invalidation. See Memorandum Opinion at 51. Given this Congressional concern, it is perfectly logical for Congress to have required permissible joint newspaper operating arrangements to meet the Act's strict definition and obtain prior Attorney General approval.

Ordered that defendant's motion for rehearing be and the same hereby is denied.

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1014

THE NEWSPAPER GUILD

v.

EDWARD H. LEVI, ATTORNEY GENERAL, APPELLANT

Appeal from the United States District Court for the District of Columbia (Civil 74-308)

Argued December 9, 1975

Decided July 1, 1976

Barry Grossman, with whom *Howard E. Shapiro* and *Samuel R. Simon*, Attorneys, Department of Justice, were on the brief, for appellant.

Victor H. Kramer, with whom *Richard B. Wolf* was on the brief, for appellee.

Before MCGOWAN, TAMM and ROBB, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

Dissenting opinion filed by *Circuit Judge* TAMM.

MCGOWAN, *Circuit Judge*: This case presents a narrow, albeit important, issue of statutory construction: Does section 4(b) of the Newspaper Preservation Act of 1970 make it unlawful to enter a joint newspaper operating agreement without the prior approval of the Attorney General, or does it rather require prior approval only for parties seeking an antitrust exemption for such an agreement? The District Court enjoined a Justice Department regulation implementing the latter interpretation. For the reasons set forth below, we reverse.

I

The Newspaper Preservation Act of 1970, 15 U.S.C. §§ 1801-04 (1970), was a congressional reaction against a successful antitrust suit brought by the Department of Justice against a combination of Tulsa newspapers in existence since 1940. *See Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969). Bills were promptly introduced in both houses of the 90th Congress to protect the Tulsa publications and twenty-one other then-existing joint newspaper operating agreements from antitrust prosecution and private liability. H.R. 19123 was referred to the House Antitrust Subcommittee, which held five days of hearings; the bill, however, was not reported out of committee. A similar Senate bill, S. 1312, was favorably reported by the Senate Subcommittee on Antitrust and Monopoly after extensive hearings, but the Judiciary Committee did not have time to act on it before the end of that session.

At the beginning of the first session of the Ninety-first Congress, bills were again introduced in both the House and Senate to sanction the Tulsa combination and to insulate other existing joint operating agreements from antitrust prosecution. Both S. 1520 and H.R. 279 contained the same provisions considered by prior con-

gressional committees reviewing S. 1312 and H.R. 19123. Among other objectives, the proposed bills declared a public interest in preserving the publication of newspapers where economic distress has caused the creation of joint operating arrangements. The proposals also defined a failing newspaper more broadly than had the Supreme Court in *Citizen Publishing*.[1]

Section 4 provided:

> (a) It shall not be unlawful under any antitrust law for any person to propose, enter into, perform, enforce, renew, or amend any joint newspaper operating arrangement if, at the time at which such arrangement is or was first entered into, not more than one of the newspaper publications involved in the performance of such arrangement was a publication other than a failing newspaper.
>
> (b) Nothing contained in this Act shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this Act, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

At the start of the Senate hearings on S. 1520, Senators Dirksen and Brooke proffered a number of amend-

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[1] The Supreme Court applied a failing company test which required that no other possible buyer existed for the failing company except the one with which the arrangement was completed, and that prospects of reorganization under the Bankruptcy Act were dim or nonexistent. 394 U.S. at 138. In contrast the Act provides:

> The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

15 U.S.C. § 1802(5) (1970).

ments for consideration. Senator Dirksen's amendment changed section 4 to include, *inter alia*, the language which eventually became the section at issue in this suit:

> (b) It shall be unlawful for any person to propose, enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the performance of such an arrangement was a publication other than a failing newspaper; Provided, however, that any publisher may, at any time, propose, enter into, perform, or enforce an agreement with any person if such agreement was not prohibited by law prior to the effective date of this Act.

Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 91st Cong., 1st Sess. 4 (1969) ["*Senate Hearings*"]. On January 30, 1970, the Senate passed S. 1520, including the Dirksen amendment; 116 CONG. REC. 2018 (1970).

Subsequently, the House Judiciary Committee favorably reported H.R. 279, as amended. H.R. REP. NO. 91-1193, 91st Cong., 2d Sess. (1970). The reported bill contained substantially the language of the Dirksen amendment to section 4,[2] except that it omitted without comment the final proviso of section 4(b). H.R. 279, as amended, was accepted by the House in lieu of S. 1520, 116 CONG. REC. 23180 (1970), and promptly adopted by the Senate without conference, *id.* at 24435.

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[2] The House Committee bill also limited the section 4(a) exemption for existing joint operating arrangements by requiring terms of a renewal or amendment to be filed with the Department of Justice. This language, along with an additional floor amendment clarifying that arrangement amendments may not add additional newspapers to the joint operation, appears in the Act as adopted.

More than one year after passage of the Act, the Department of Justice gave notice of a proposed rulemaking concerning the Act. 36 Fed. Reg. 20435 (1971). Along with definitions and procedures for filing both the terms of new arrangements and those of renewals or amendments to existing arrangements, the proposed rulemaking included a purpose section which specified in relevant part:

> These regulations set forth the procedure by which application may be made to the Attorney General for his approval of joint newspaper operating arrangements entered into after July 24, 1970. . . .

Id., § 48.1. A few weeks later, the Department of Justice gave notice of an addition to the proposed purpose section:

> The Newspaper Preservation Act does not require that all joint newspaper operating arrangements obtain the prior written consent of the Attorney General. The Act and these regulations provide a method for newspapers to obtain the benefit of a limited exemption from the antitrust laws if they desire to do so. Joint newspaper operating arrangements that are put into effect without the prior written consent of the Attorney General remain fully subject to the antitrust laws.

Id. at 23630, § 48.1. The proposed regulation, including the addition, was promulgated as an interim regulation on January 2, 1974. 39 Fed. Reg. 7 (1974).

The Newspaper Guild filed suit shortly thereafter alleging that the regulation contravened section 4(b) of the Act. On motions for dismissal and summary judgment, the District Court declared the challenged regulation invalid and enjoined its implementation. *Newspaper Guild v. Saxbe*, 381 F. Supp. 48, 53 (D.D.C. 1974).[3] The Department of Justice appeals from that final order.

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[3] The Government asked the District Court to reconsider its decision and pointed out that, contrary to language in the

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A rigidly literal reading of section 4(b) undeniably provides support for the District Court's conclusion that "all joint newspaper operating arrangements not in effect on July 24, 1970 must obtain the Attorney General's consent before they may be put into effect." 381 F. Supp. at 53. But, as the Supreme Court has frequently reminded us, "it [is] fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but should look to the provisions of the whole law, and to its object and policy.'" *Richards v. United States*, 369 U.S. 1, 11 (1962), quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956) (footnotes omitted); *see e.g., Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943). After reviewing the Act in that spirit, we cannot agree that the District Court's interpretation of section 4(b) is compelled either by the language of the statute or its underlying legislative history.

It is appropriate to start with the views of Senator Dirksen, the sponsor of the amendment that eventually became section 4(b). He explained his proposed amendment as follows:

> There has been some concern expressed regarding the possibility of new joint operating arrangements being established under the terms of S. 1520, as introduced. There are still some 36 or 37 cities where two or more papers are competing commercially as well as editorially. And, there has been a genuine

trial court opinion, all operating arrangements were not entered into by competing newspapers. *See* slip opinion page 8 *infra*. The court denied this motion and reaffirmed its reliance on the plain language and legislative history of section 4(b). 381 F. Supp. at 53-54.

> fear expressed by suburban papers, newspaper unions, and some segments of the public and [sic] to the dangers inherent if some of these other papers were to improperly enter into joint operating arrangements—resulting in what might be a stronger competitive force, the loss of jobs, and, maybe, eventually a loss of independent viewpoints.
>
> This is what I had in mind in proposing Section 4(b). *Before any new joint operating arrangements could come into being, the papers involved would be required to come before the Attorney General for his approval. This is not really an unusual situation, since the Department of Justice now receives prior notice of many impending mergers by the parties, who themselves are seeking 'release' letters. I envision the procedures under section 4(b) to be akin to the 'release' letter technique now employed by the Department.* Before authorizing such arrangements in the future, the Department could hear from other interested parties—competing papers, unions, etc.—as well as make its own investigation, in order to be certain that the new arrangement is essential and is justified.
>
> Further, Section 4(b) will act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition.

Senate Hearings at 9 (emphasis added). We think it plainly apparent from this statement that Senator Dirksen did not intend the result reached by the District Court, for declaring it unlawful to proceed without Justice Department consent does not resemble in the slightest the release letter technique employed by the Department of Justice.[4]

[4] Under that release procedure, codified at 28 C.F.R. § 50.6 (1975), the Department of Justice, at the request of the par-

Even if Senator Dirksen's purposes were not already visible, further enlightenment is to be obtained from a proviso which he originally proposed as part of section 4(b): "Provided, however, that any publisher may, at any time, propose, enter into, perform, or enforce an agreement with any person if such agreement was not prohibited by law prior to the effective date of this Act." Senator Dirksen explained the thrust of that proviso: "The proviso at the end of section 4(b) is just to make sure that we have not *inadvertently* made illegal, in fact or by implication, arrangements which are now lawful." *Senate Hearings* at 9 (emphasis added).

Senator Dirksen's position is directly contrary to the interpretation of the District Court, since under the latter's view certain arrangements that were lawful under the antitrust laws would nevertheless violate section 4(b). For example, the Attorney General would be unable to "approve" a joint operating agreement between two healthy, *non-competitive* newspapers since he is required by statute to grant approval only if he finds that no more than one of the newspapers involved is "other than a failing newspaper." 15 U.S.C. § 1803(b) (1970); *see id.* § 1802(5) (definition of failing newspaper). Consequently, under the District Court's interpretation, *it is unlawful* to enter into an otherwise lawful arrangement simply because the Attorney General did not—and indeed could not—give prior written consent.

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ties, can state its present enforcement intention with respect to a proposed merger or acquisition. The resulting business review letter "states only the enforcement intention of the Division as of the date of the letter, and the Division remains completely free to bring whatever action or proceeding it subsequently comes to believe is required by the public interest. As to a stated present intention not to bring an enforcement action, however, the Division has never exercised its right to bring a criminal action where there has been full and true disclosure at the time of the request."

The history of the proviso itself sheds light on the purpose of section 4(b). The initial Senate version contained the proviso, which, as we noted above, was inserted to avoid making illegal what had been lawful prior to the Newspaper Preservation Act. The proviso was dropped when the House bill was reported by the Judiciary Committee, but there is no indication in the report as to why the proviso was deleted. *See* slip opinion page 4 *supra*. The Senate was urged by Senator Hruska, the floor manager of the bill, to adopt the House version rather than go to conference, and he specifically noted that the House "modified the two amendments somewhat and effected other amendments *which did not go to the substance of the bill.*" 116 CONG. REC. 24434 (1970) (emphasis added). Based on that evidence alone, the failure to enact the proviso provides some support, however slight, for the position that section 4(b) *was not intended* to make illegal what had been lawful prior to the Act.

The dissent nevertheless concludes that "deletion of the status quo proviso points more reasonably to a broad requirement of prior approval for all future arrangements." Dissent at 8. Judge Tamm reaches that conclusion based on a review of the floor discussion in the Senate concerning the House amendments, noting that both proponents and opponents of the bill recognized that the House version granted a more limited exemption than had the Senate bill. We agree that the floor discussion of the House amendments suggests the Senate's awareness that the House version "tighten[ed] the standards" with respect to whether a newspaper was "failing" and therefore eligible for the antitrust exemption. But there is nothing that indicates that the Senate thought that the House amendments made illegal what had been lawful under the Senate version. Surely if the Senate concluded that the amended House version accomplished such a major change, the issue would have been discussed di-

rectly rather than couched in terms of "tightening" the standards for availability of the exemption.

The various committee reports point in the same direction as did Senator Dirksen. We think it worth setting out in full the House Report's "analysis" of section 4(b):

> Section 4(b) applies to joint newspaper operating arrangements that come into being after enactment of the bill. *Such joint newspaper operating arrangements, to have the benefit of an exemption from the antitrust laws, must have the prior written consent of the Attorney General of the United States.* Prior to granting the approval, the Attorney General is required to determine that not more than one of the newspaper publications involved was a publication other than a "failing newspaper" as defined in the Act. The Attorney General also is required to find that approval of the arrangement would effectuate the policy and purposes of the Act. Section 4(b) contemplates that the Attorney General will promulgate such regulations as are appropriate for the discharge of these responsibilities.

H.R. REP. NO. 91-1193, 91st Cong., 2d Sess. 11 (1970). We can give the House Report only one interpretation, namely, to have the benefit of an antitrust exemption, prior written consent is required; but simply to put a joint operating arrangement into effect, consent is not required, though absent approval the arrangement remains fully subject to the antitrust laws.

There is language in the Senate Report which supports the interpretation of the District Court, but when read in the context of the entire Senate Report that interpretation appears strained. In discussing the purposes of the legislation the Senate Report indicates that the bill was intended to grant limited antitrust exemptions to past agreements . . . *and to make this method of insuring newspaper stability available to newspapers in danger of financial collapse after passage of the bill.*"

S. REP. NO. 91-535, 91st Cong., 1st Sess. 2 (1969). Surely it is somewhat odd to claim that Congress has made an exemption "available" by declaring it unlawful to proceed without the "exemption." The Senate Report, like the House Report, nowhere mentions the imposition of a new standard of substantive liability.

With respect to the floor debates, we need only reemphasize the point made above with respect to the committee reports and Senator Dirksen's statements. There are statements to the effect that new agreements must come before the Attorney General for approval. But such statements are consistent with the Government's interpretation of section 4(b); indeed, legislators would not normally be expected constantly to reiterate the magic words "in order to obtain an antitrust exemption" while discussing a bill directed to that very purpose. We have been unable to locate statements indicating that it is *unlawful* to proceed without the Attorney General's written consent. To the contrary, the Government's brief collects numerous citations to the floor debates indicating that the purpose of the bill was well understood—the availability of an antitrust exemption in appropriate circumstances upon voluntary application therefor.

Other factors suggest that the District Court's interpretation does not reflect the intent of Congress. For one thing, Congress provided neither civil nor criminal penalties to enforce the new substantive standard it purports to find in the statute. The dissent argues that this "does not rebut the clear directive that newspapers must obtain written consent before implementing a joint operating arrangement," Dissent at 10; if, as we think, that "directive" is far from "clear," the absence of an enforcement scheme cuts the other way.

Furthermore, as we noted earlier, many arrangements without anticompetitive impact do not qualify for Attorney General approval given the statutory standard, and

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that as a result the District Court's interpretation makes unlawful certain joint operating agreements that prior to the Newspaper Preservation Act were lawful within the meaning of the antitrust laws. *See* slip opinion page 8 *supra*. We find such a result anomalous in an Act clearly designed *to create an exemption* to the antitrust laws.

This brings us to the core of our disagreement with the District Court's interpretation. That interpretation necessarily implies that Congress sought to limit joint arrangements in the newspaper industry by adding the obstacle of prior approval to those that would otherwise not be prohibited by the antitrust laws. Such a view suggests that Congress perceived a special reason to fear combinations in, or a special difficulty in applying antitrust laws to, the newspaper industry. But we have found no evidence in the record—or, for that matter, in any public debate—indicating that such concerns existed. Rather, the record reveals that the purpose of the Act was just the opposite—to permit combinations in the newspaper industry that would otherwise be prohibited by the antitrust laws. H.R. REP. No. 91-1193, 91st Cong., 2d Sess. 3 (1970) (purpose of the Act is "[t]o provide a limited exemption from the antitrust laws for joint newspaper operating arrangements entered into in the future with the prior written consent of the Attorney General. . . .").

This statute is, in Congress's own terms, "An Act to exempt from the antitrust laws certain combinations and arrangements necessary for the survival of failing newspapers," 84 Stat. 466; indeed, the very section of the Act at issue here is captioned "Antitrust exemption." *See, e.g., Lan Jen Chu v. Commissioner*, 486 F.2d 696, 700 (1st Cir. 1973) (language used in caption of statute provides at least some evidence of intended congressional scheme); *White v. Chicago, Burlington & Quincy R.R.*,

417 F.2d 941, 948 (8th Cir. 1969) (title of act can be considered in construing act). The Act was a speedy and self-proclaimed response to *Citizen Publishing Co., supra*, and, as such, was designed to help failing newspapers, not to place additional burdens on healthy ones.

Careful draftsmanship would have undoubtedly produced a provision whose language less ambiguously indicates the intended result. But the fact that Congress acted swiftly and with less than the desired degree of precision does not argue for rigid reliance upon the literal text of the statute. It rather alerts the court to the need for delving more deeply into the congressional purpose. Legislative history is a contextual rather than a purely textual tool of construction. We conclude that the interpretation of the District Court is at odds with the "object and policy" of the Congress. *See Richards v. United States, supra*, 369 U.S. at 11. The decision of the District Court is therefore reversed.

It is so ordered.

TAMM, *Circuit Judge, dissenting*: The issue in this case is whether section 4(b) of the Newspaper Preservation Act of 1970 creates a substantive rule of law requiring *all* joint newspaper agreements entered into after 1970 to obtain prior approval of the Attorney General. The majority opinion holds instead that the Act requires approval only for those newspapers that wish to take advantage of an antitrust exemption. While I agree that Congress might have been wiser to select this method of optional approval, the statute and my reading of the legislative history convince me that this is not the choice Congress actually made.

The majority opinion concludes that the regulation promulgated by the Justice Department accurately interprets section 4(b). Although great deference is due an interpretation of a statute by the agency or department charged with its enforcement, *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 381 (1969), this deference must yield to patent disregard of the plain and unambiguous language of a statute. *See, e.g., Campbell v. Brown*, 245 F.2d 662, 666 (5th Cir. 1957); *Santiago v. Gardner*, 288 F. Supp. 156, 159 (D.P.R. 1968).

Similarly, a change in interpretation by the department, while entitled to some deference, is granted less weight than a long-standing policy dating from passage of the statute. *United States v. Healey*, 160 U.S. 136, 145 (1895); *cf. Udall v. Tallman*, 380 U.S. 1, 16, *rehearing denied*, 380 U.S. 989 (1965). While the challenged regulation is the first promulgated by the Attorney General in response to the Newspaper Preservation Act, the interpretation appears to conflict with the initial determination of Assistant Attorney General Richard W. McLaren, Antitrust Division, who represented the Department of Justice in the hearings before the House and Senate. Having expressed Justice's disapproval of the proposed bill, he also noted the Department's dissatisfaction with the Dirksen amendments:

> Senator Dirksen's bill, as I read it, would give antitrust immunity to agreements already in effect, but *would make prospective agreements unlawful, unless first approved by the Attorney General on a finding that a failing newspaper was involved.*
>
> We oppose this bill for the same reasons that we oppose S. 1520, and for the additional reason that, as a matter of principle, we oppose vesting regulatory authority in the Attorney General.
>
> Whether or not particular conduct violates the law, we think, should be decided by the courts and not by a prosecutor.

Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Judiciary Comm., 91st Cong., 1st Sess. 297 (1969) (*"Senate Hearings"*) (emphasis added). Mr. McLaren again stressed this aversion to a regulatory function for Justice in the House hearings. *Hearings on H.R. 279 and Related Bills Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 91st Cong., 1st Sess. 375 (1969) (*"House Hearings"*). Although this testimony may appear equivocal as it relates to the specific issue of whether the Department of Justice had to approve all new arrangements, it casts a pall over the interpretation given in the regulation. This is particularly true since the original proposed regulation did not limit the filing requirements to newspapers seeking antitrust immunity. *See* 36 Fed. Reg. 20435, discussed *supra*. Regardless of whether the challenged regulation represents a change of heart by a department reluctantly exercising its unwanted responsibility or a belated concern with a problem of interpretation not directly faced before, it does not come to us armed with the force of a contemporaneous interpretation of the enforcement department. Furthermore, I am particularly hesitant to accept this interpretation since it conflicts with both the language of the Act and my reading of the legislative history.

As the majority opinion points out, there is no question that the Newspaper Preservation Act was passed in an atmosphere of concern that late-blooming antitrust prosecution by the Department of Justice would unfairly penalize existing joint operating arrangements which had functioned for years without governmental disapproval and, by deterring new arrangements, would compel failing papers of the future to sell to their competitors, thus depriving metropolitan areas of the benefits of competing editorial staffs and policies. The concept of a limited newspaper exemption from antitrust law clearly pervades the Act and the history of its enactment.

Within the statute itself, this antitrust milieu is evident. "Antitrust law" is one of the major terms defined, 15 U.S.C. § 1802(1) (1970), and the legislative annulment of the holding of *Citizen Publishing* and similar cases pending on the Act's effective date refers to actions alleging antitrust law violations, *id.* at § 1804(a), (b). Even the language of section 1803 (section 4 of the Act) emphasizes this relationship. Under subsection (a), certain existing arrangements are declared not "unlawful under any antitrust law," while subsection (c) assures that the Act will not "exempt from any antitrust law any predatory pricing, any predatory practice or any other conduct . . . which would be unlawful under any antitrust law if engaged in by a single entity."

The interpretation issue before us arises because this "unlawful *under antitrust law*" language does not appear in subsection (b). Instead, the provision states simply that "[i]t shall be unlawful" to enter into new operating arrangements without the prior consent of the Attorney General. Customary rules of statutory construction alone lend credence to the conclusion that use of the term "unlawful under antitrust laws" in all subsections except (b) evidences Congressional intent to distinguish a new type of violation. The legislative history, moreover, convinces me that the broad language employed

in section 1803(b) means exactly what it says:[1] *all new joint operating arrangements which do not receive prior approval are illegal, regardless of whether they would otherwise violate antitrust laws.*

The history of the bill reveals a compromise measure aimed at protecting labor and financially competing papers as well as preserving editorial competition. Senator Dirksen, in explaining his proposed amendment to section 4 of the Act, stated:

> *Sec.* 4 (b) is a new section which provides that *any* future joint operating arrangements must have prior Justice Department consent. In this way, the interest of the suburban papers and the unions will be considered by the Justice Department before any new arrangements are authorized.
>
> These two new subsections 4(a) and (b) provide a reasonable compromise for all of the parties involved. The equities of the present situation in the 22 joint operating cities will be maintained; the suburban newspapers and unions will be protected in the future; and a broad exception to the antitrust laws has been avoided.

Senate Hearings at 5 (emphasis added). He later expanded upon this compromise theme:

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[1] This circuit has rejected a plain meaning rule which forbids consideration of legislative history when the language of the statute is clear and unambiguous. *See, e.g.*, March v. United States, 506 F.2d 1306, 1313-15 (D.C. Cir. 1974). *See also* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COL. L. REV. 1299 (1975). As Justice Felix Frankfurter once stated, "In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 544 (1947). *See also* Train v. Colorado Public Interest Research Group, 44 U.S.L.W. 4717, 4719 (U.S. June 1, 1976).

The new language is designed to offer a means of protection to the small suburban and weekly newspapers, and to newspaper employees and their unions, while preserving the separate editorial voices now flourishing in the 22 cities with joint operating arrangements. It offers a compromise solution which should meet the immediate needs of all involved: those papers now in joint operating arrangements, newspapers which may some day have to turn to joint operations as their only chance for survival; suburban newspapers which compete with the metropolitan papers for advertising revenue; workers who are employed by newspapers; and most significantly, the public interest.

. . . .

There has been some concern expressed regarding the possibility of new joint operating arrangements being established under the terms of S. 1520, as introduced. There are still some 36 or 37 cities where two or more papers are competing commercially as well as editorially. And, there has been a genuine fear expressed by suburban papers, newspaper unions, and some segments of the public and [*sic*] to the dangers inherent if some of these other papers were to improperly enter into joint operating arrangements—resulting in what might be a stronger competitive force, the loss of jobs, and, maybe, eventually a loss of independent viewpoints.

This is what I had in mind in proposing Section 4(b). *Before any new joint operating arrangements could come into being, the papers involved would be required to come before the Attorney General for his approval.* . . . Before authorizing such arrangements in the future, the Department could hear from other interested parties—competing papers, unions, etc.—as well as make its own investigation, in order to be certain that the new arrangement is essential and is justified.

Further, Section 4(b) will act as a brake upon other newspapers which might otherwise prematurely turn to joint operating arrangements, without testing other means of maintaining full commercial and editorial competition.

Id. at 8-9 (emphasis added). *See also* Remarks of Senator Hruska, 116 CONG. REC. 2005-06 (1970).

As sponsor of the amendment and a strong supporter of the bill, Senator Dirksen was well aware of the competing interests that would be affected by the proposed legislation. Both the Department of Justice and the Federal Trade Commission were strongly opposed to further fragmentation of the antitrust laws. *See Senate Hearings* at 294-312; *House Hearings* at 357-403, 475-96. In addition, the American Bar Association adopted a resolution echoing this opposition. 116 CONG. REC. 23143 (1970). While a few local unions associated with existing joint operating arrangements supported the bill, the American Newspaper Guild, the AFL-CIO, the International Typographical Union, the New England Press Association and others in the newspaper industry registered strong disapproval. *Compare House Hearings* at 19, 42-43, 56-67, 404-13, 427-28; *to Senate Hearings* at 238-49, 287-90. *See also House Hearings* at 414-20, 427; 116 CONG. REC. 23175 (1970). Both newspapers and publishing employees expressed fear that allowing future arrangements would be unduly anticompetitive and would cause loss of jobs. The New England Press Association claimed that the legislation was "designed to prevent this natural change from central city dailies to strong suburban newspapers" and would "do great damage to individual newspaper owners." *House Hearings* at 427. William Loeb, publisher of the *Manchester Union Leader*, cautioned the committee that

> [t]here are thousands of weekly papers throughout the whole United States, and small newspapers, from

> which [Committee members] have not heard, who are violently opposed to this legislation. Unfortunately they have neither the means nor the association to bring so effectively to bear their views as have the larger newspapers, BUT—and this is the important thing to remember—their total readership is very large indeed.

House Hearings at 510. The Newspaper Guild claimed loss of jobs while the International Typographical Union recounted horror stories of the labor problems encountered under existing arrangements. *Senate Hearings* at 239, 289-90. These problems had been articulated in greater detail in the 1967-68 hearings on prior newspaper preservation bills. *See, e.g., Hearings on H.R. 19123 and Related Bills Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 90th Cong., 2d Sess., ser. 25, at 357-64, 367-422 (1968); *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess., pt. 1, at 105-72; pt. 2, at 1022-34; pt. 6, at 2545-68, 2615-23, 2625-52, 2673-97. The Dirksen amendment to section 4 was a clear response to these concerns.

The majority opinion relies heavily on the proviso to the Dirksen amendment which maintained the legal status of joint activities not illegal under antitrust laws existing at that time. Even if this provision would have militated against the absolute requirement of prior approval suggested in the remainder of section 4(b),[2] it was rejected by the House and, upon reconsideration, by the Senate. The House Judiciary Committee favorably reported the bill in the form in which section 4(b) now appears. No indication in the report explains why the

[2] It is conceivable that this proviso might have been intended to expand the Attorney General's power to approve arrangements not conflicting with general antitrust principles rather than to limit the types of arrangements which must obtain approval.

Dirksen amendment was only partially accepted. Senator Hruska, floor manager for the bill upon its return from the House, urged adopting of the House version without having to go to conference. As for the changes, he stated only:

> The other body, just last week, *modified the two amendments somewhat* and effected other amendments which did not go to the substance of the bill.

116 CONG. REC. 24434 (1970) (emphasis added). While the statement intimates that the House amendments were minor, both supporters and opponents of the bill recognized the major substantive changes created by the House. One alteration minimally acknowledged by Senator Hruska was the fact that the House bill created a far more limited exemption than had the Senate version.[3] Since this substantial change was brushed off lightly by Senator Hruska, reliance on his statement that the Dirksen amendment had been modified "somewhat" seems risky. I would agree rather with the thoughtful evaluation by the district court that deliberate deletion of the status quo proviso points more reasonably to a broad requirement of prior approval for all future arrangements. This seems particularly true since, in spite of vociferous arguments that final settlement in the Tucson case proved that current antitrust law allowed most, if not all, of the joint operating arrangements needed for failing papers, proponents of the bill still insisted upon the exemptions provided in section 4. *See, e.g.*, 116 CONG. REC. 1802-03 (1970). In order to maintain these exemptions, I believe, proponents accepted further limitations in section 4(a)

[3] The House Committee bill also limited the section 4(a) exemption for existing joint operating arrangements by requiring terms of a renewal or amendment to be filed with the Department of Justice. This language, along with an additional floor amendment clarifying that arrangement amendments may not add additional newspapers to the joint operation, appears in the Act as adopted.

and strengthened the prior approval of section 4(b) to assuage the fears of those who opposed the bill. Excerpts from the House debate illustrate the quid pro quo nature of section 4(b).

> Mr. MCCULLOCH. . . . In addition, the prospective application of this exception now is carefully circumscribed by requiring the consent of the Attorney General for any future joint newspaper arrangements.

116 CONG. REC. 23148 (1970).

> Mr. RAILSBACK. . . . Recognizing the historic inactivity on the part of the enforcement agencies and the reliance upon such inactivity by various newspapers in effecting the currently existing joint newspaper operating arrangements, the bill provides a relatively more liberal standard for determining whether the antitrust exemption applies to such arrangements. Nevertheless, prospective availability of the exemption has been sharply restricted by requiring the consent of the Attorney General for any future joint arrangement. . . .

Id. at 23154. *See also* remarks of opponent Mr. Edwards of California:

> The [House] Judiciary Committee did improve the Senate-passed version by making it more difficult for new joint agreements providing for profit sharing and price fixing to come into existence. Any new agreements must be approved in advance by the Attorney General. . . .

Id. at 23167. I believe that, in this compromise setting, the House deletion of the proviso reflects a desire to protect even more completely the labor groups and suburban newspapers whose interests had sparked Senator Dirksen's amendment.

The majority also argues that if Congress had intended a new standard of liability for all future joint operating arrangements it would have provided civil or criminal

penalties, whereas the Newspaper Preservation Act has no penalty section. Although I readily agree that this omission may indicate a lack of thorough planning by Congress, it does not rebut the clear directive that newspapers must obtain written consent before implementing a joint operating arrangement. The Act, applying as it does to federal antitrust law, may have created a new specific antitrust violation subject to the penalty and enforcement provisions of the Federal Trade Commission Act, the Sherman Anti-Trust Act, and the Clayton Act. See, *e.g.*, 15 U.S.C. §§ 3-4, 15-15a, 21, 25, 26 (1970); §§ 1-2, 45, 50, *as amended* (Supp. IV 1974). The violation may form the basis for implying a right for the Attorney General to seek injunctive relief. Perhaps civil remedies, as suggested by appellee, Appellee's Br. at 18, are appropriate. As the trial court properly noted, this suit challenging the interim regulation does not present the issue of what, if any, remedy is to be applied. 381 F. Supp. at 52-53. If and when that question arises, the court will be able to apply the recent guidelines of the Supreme Court as to implied remedies. *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers* ("*Amtrak*"), 414 U.S. 453, *rehearing denied*, 415 U.S. 952 (1974); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964). *See also* Comment, *Private Rights of Action Under* Amtrak *and* Ash: *Some Implications for Implication*, 123 U. PA. L. REV. 1392 (1975); Comment, *The Phenomenon of Implied Private Actions Under Federal Statutes: Judicial Insight, Legislative Oversight or Legislation by the Judiciary?*, 43 FORDHAM L. REV. 441 (1974). I observe only that when Congress has in the past declared conduct illegal without prescribing a remedy, the courts have shown themselves capable of fashioning enforcement procedures to carry out the legislative scheme. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414

n.13 (1968) (implying equitable remedy from 42 U.S.C. § 1982 (1970) which guarantees to all citizens the right "enjoyed by white citizens" to own or dispose of property).[4] There is no reason to believe that the judiciary would be unable to apply this same skill in carrying out the dual policies of the Newspaper Preservation Act.

The majority opinion also points out that the Act's very broad definition of a joint operating agreement[5]

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[4] We note also the many instances where courts have fashioned private remedies from regulatory legislation prescribing only governmental enforcement. *See, e.g.*, J. I. Case Co. v. Borak, 377 U.S. 426 (1964) (private right of action under section 14(a) of the Securities Exchange Act of 1934); Fitzgerald v. Pan American World Airways, Inc., 229 F.2d 499 (2d Cir. 1956) (private remedy for passenger racially discriminated against in violation of section 404(b) of the Civil Aeronautics Act); Guernsey v. Rich Plan of the Midwest, 44 U.S.L.W. 2388 (N.D. Ind. Feb. 2, 1976) (consumer remedy under section 5(a)(1) of the Federal Trade Commission Act). These cases would be particularly relevant if a later court should determine that section 1803(b) creates a special antitrust violation under the general antitrust laws.

[5] (2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangements entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: *Provided*, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

15 U.S.C. § 1802(2) (1970).

covers many arrangements which would not have been illegal under prior antitrust laws, *e.g.*, using joint production facilities without fixing advertising or circulation rates. The standard by which the Attorney General must gauge arrangements submitted for his approval is stringent: he must "determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter." 15 U.S.C. § 1803(b) (1970). The Justice Department argues that since many non-anticompetitive arrangements could not be approved under this test, Congress could not possibly have intended this result.

The compromise measure selected by the legislature is an acknowledged deviation from basic antitrust principles. It is not unthinkable that, just as Congress exempted certain newspaper profit pooling and price fixing arrangements from the antitrust laws, it also subjected the industry to more stringent requirements for any cooperative ventures. As pointed out frequently during discussion of the bill, Congress had already carved out special antitrust rules for banks, agricultural cooperatives, and professional sports. *See, e.g.*, 116 CONG. REC. 1789 (1970).

Of course, it is equally possible that in subjecting all arrangements to approval, thus protecting unions and other newspapers from adverse results, Congress simply failed to protect another interest which, if considered under less pressing time strictures, it might decide to foster. Our function in interpreting the statute, however, is not to second guess what Congress would decide today if this problem of the industry were presented for legislative resolution.

> Cardozo put it this way: "We do not pause to consider whether a statute differently conceived and

framed would yield results more consonant with fairness and reason. We take this statute as we find it." . . . An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.

Frankfurter, *supra* note 1, at 534. The court must interpret the Act according to its terms and its history, relying on Congress to remedy legislation that is overinclusive or under-reflective.

In passing the Newspaper Preservation Act, Congress attempted to balance the competing interests of what it perceived as a threatened newspaper industry against the dangers of anticompetitive practices. The highly controversial bill, opposed by national unions and organizations of suburban newspapers, was amended numerous times to allay the fears of its opponents that a few newspapers would be benefited at the expense of the entire industry. The prior approval concept, presented first in the Dirksen amendment, introduced an element of governmental supervision to limit the use of future arrangements. Congress may not have considered all the ramifications of imposing this requirement on every future agreement regardless of its compliance with other antitrust laws, and legislators eager to prevent private litigation against existing arrangements may have failed to provide adequately for enforcement of the compromise measure. These unfortunate possibilities, however, do not change the fact that Congress appears to have selected a scheme wherein all agreements would be subject to prior approval. I must conclude with the district court that the expansive language of section 4(b), "whether careless or calculated," is clear and supported by legislative history. For these reasons I respectfully dissent.

APPENDIX C

The Newspaper Preservation Act, 15 U.S.C. § 1801 et seq., provides:

15 U.S.C. 1801, § 2 of the Act

In the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement has been heretofore entered into because of economic distress or is hereafter effected in accordance with the provisions of this chapter.

15 U.S.C. 1802, § 3 of the Act

As used in this chapter --

(1) The term "antitrust law" means the Federal Trade Commission Act and each statute defined by section 44 of this title as "Antitrust Acts" and all amendments to such Act and such statutes and any other Acts in pari materia.

(2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper

owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method,and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

(3) The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

(4) The term "newspaper publication" means a publication produced on newsprint paper which is published in one or more issues weekly (including as one publication any daily newspaper and any Sunday newspaper published by the same owner in the same city, community, or metropolitan area), and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion.

(5) The term "failing newspaper" means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure.

(6) The term "person" means any individual, and any partnership, corporation, association, or other legal entity existing under or authorized by the law of the United States, any State or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country.

15 U.S.C. 1803, § 4 of the Act

(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: Provided, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

(b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter.

(c) Nothing contained in the chapter shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this chapter, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.

15 U.S.C. 1804, § 5 of the Act

(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any

party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 1803(a) of this title.

(b) The provisions of section 1803 of this title shall apply to the determination of any civil or criminal action pending in any district court of the United States [1] on July 24, 1970, in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

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1 Word "States" reads "State" in original.

No. 76-657

JUN 19 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

THE NEWSPAPER GUILD, PETITIONER

v.

EDWARD H. LEVI, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B, pp. 21b-46b) is reported at 539 F. 2d 755. The opinion of the district court (Pet. App. A, pp. 1a-20a) is reported at 381 F. Supp. 48.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976. A petition for rehearing with a suggestion for rehearing *en banc* was denied on August 19, 1976. The petition for a writ of certiorari was filed on November 10, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 C.F.R. 48.1, which provides that not all joint newspaper operating arrangements require the prior written consent of the Attorney General but that such arrangements that are put into effect without such consent remain fully subject to the antitrust laws, is consistent with Section 4(b) of the Newspaper Preservation Act.

STATUTE AND REGULATION INVOLVED

The Newspaper Preservation Act, 84 Stat. 466, 15 U.S.C. 1801 *et seq.*, is set forth at Pet. App. C, pp. 47c-51c. The challenged federal regulation, 28 C.F.R. 48.1, is set forth at Pet. 3-4.

STATEMENT

The Newspaper Preservation Act, 84 Stat. 466, 15 U.S.C. 1801 *et seq.*, was enacted in response to *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, in which a joint operating arrangement between competing newspapers was held to be a *per se* violation of Section 1 of the Sherman Act. The Act granted an exemption from the antitrust laws to the 22 joint newspaper operating arrangements then in existence (Section 4(a) of the Act, 15 U.S.C. 1803(a)), and permitted reinstitution of the joint arrangement that had been invalidated in *Citizen Publishing Co.* (Section 5 of the Act, 15 U.S.C. 1804). See H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 3 (1970); 116 Cong. Rec. 24434 (1970).

Congress also provided in Section 4(b) of the Act, 15 U.S.C. 1803(b), that "[i]t shall be unlawful for any person to enter into * * * a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States." The Attorney General may consent if he determines "that not more than one of the newspaper[s] * * * involved in the arrangement

is * * * other than a failing newspaper, and that approval * * * would effectuate the policy and purposes of this chapter." *Ibid.* Upon the approval of the Attorney General, the joint operating arrangement is exempt from the antitrust laws.

On January 2, 1974, the Attorney General promulgated a regulation (28 C.F.R. 48.1; Pet. 3-4) stating that the Newspaper Preservation Act does not require that all joint newspaper operating arrangements be submitted for prior approval, but rather, that such approval is necessary only if the parties seek the antitrust exemption that the Act provides. The regulation also states that joint newspaper operating arrangements put into effect without the Attorney General's approval would be "fully subject to the antitrust laws." *Ibid.*

Petitioner sued in the United States District Court for the District of Columbia to have the regulation declared invalid and to enjoin its implementation. The district court granted summary judgment for petitioner, on the ground that a literal reading of Section 4(b) required that all joint newspaper operating arrangements be submitted for the approval of the Attorney General (Pet. App. A, pp. 1a-20a).

A divided court of appeals reversed (Pet. App. B, pp. 21b-46b). The court acknowledged that "[a] rigidly literal reading" of Section 4(b) in isolation from the rest of the statute and its legislative history would support the district court's conclusion (Pet. App. B, p. 26b). But the court looked beyond the isolated language of Section 4(b) "to the provisions of the whole law, and to its object and policy" (Pet. App. B, p. 26b, quoting *Richards* v. *United States*, 369 U.S. 1, 11). After a careful examination of these factors, the court of appeals concluded that Section 4(b) is properly construed, not as requiring as a condition of legality that all joint newspaper arrangements obtain prior approval, but as creating an exemption from the antitrust laws for those joint operating arrangements that do obtain such approval. The

court held that the legislative history shows that in enacting Section 4(b) Congress did not intend to make illegal all otherwise valid joint operating arrangements that did not obtain the Attorney General's approval (Pet. App. B, pp. 26b-32b).

ARGUMENT

The decision of the court of appeals is correct and raises no issue warranting review by this Court.

Petitioner agrees that the court of appeals properly considered legislative history in interpreting the statute (Pet. 22).[1] It contends that the legislative history is not clearly inconsistent with a literal interpretation of the statute, that the literal interpretation therefore must be accepted, and thus that the regulation is invalid. Petitioner's view of the legislative history, however, is incorrect.

As construed by the district court, Section 4(b) would create a new offense. Under the Act, the Attorney General may approve joint newspaper operating arrangements only if he determines that not more than one of the newspapers is not failing. With the Attorney General's authority thus limited, the district court's construction of Section 4(b) would render illegal any joint operating arrangement between two or more financially healthy newspapers, without regard to whether such a joint venture would violate the antitrust laws or any other public policy.

The court of appeals correctly concluded that this was not the intent of Congress. The legislative history

[1]As the court of appeals noted, Congress' failure to enact any procedural or penalty provisions to enforce what under the district court's view would be a new substantive offense, though not conclusive, does provide reason to doubt whether Congress actually intended such a result. In this circumstance, the court of appeals' scrutiny of legislative history was appropriate and necessary.

shows that the Act was adopted to create an antitrust exemption for certain joint newspaper arrangements, in response to the decision in *Citizen Publishing Co.* v. *United States, supra,* and not for the converse purpose of prohibiting previously lawful newspaper joint ventures (see Pet. App. B, pp. 26b-29b). Petitioner quotes language of both Senator Dirksen and Assistant Attorney General McLaren to support its contention that Section 4(b) reflected a congressional compromise by which previously legal conduct would be made illegal in exchange for the exemption for previously illegal conduct (Pet. 5-7). However, the quoted language does not support petitioner's view of congressional intent, for the bill Senator Dirksen and Assistant Attorney General McLaren were discussing explicitly provided that the Act would not make illegal any conduct which was then legal under the antitrust laws (Pet. App. B, p. 28b).[2] See also H.R. Rep. No. 91-1193, 91st Cong., 2d Sess. 11 (1970).

Moreover, petitioner's construction of Section 4(b) would have anomalous results. Congress was concerned about the precarious financial health of the newspaper industry and for that reason provided an antitrust exemption for financially-troubled papers (Pet. App. B, p. 23b). Yet petitioner would read the statute so as to deny to solvent papers the right to enter cost-saving joint ventures that do not violate existing antitrust law. Solvent papers would thus be denied a major means of avoiding the financial losses that were of such concern to Congress.

As the court of appeals pointed out (Pet. App. B, pp. 29b-30b), had Congress intended such a major change in the

[2]The proviso was deleted from the final version of the bill, but as the court of appeals pointed out (Pet. App. B, p. 29b), nothing in the legislative history suggests that Congress considered the deletion to have substantive significance.

law as a *quid pro quo* for the antitrust exemption, one would expect to find some specific discussion of this decision and of the policy reasons for imposing upon newspaper joint ventures stricter standards than are applicable to other industries. There is no such discussion in the legislative history, and the court of appeals was correct in ascribing significance to this silence. *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1.

For the foregoing reasons, the court of appeals properly rejected the district court's interpretation of Section 4(b) and held the federal regulation to be reasonable and consistent with the Act. Cf. *Udall* v. *Tallman*, 380 U.S. 1, 16; *Zemel* v. *Rusk*, 381 U.S. 1, 11; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Knebel* v. *Hein*, No. 75-1261, decided January 11, 1977, slip op. 5-6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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